1 In the Supreme Court of the United States. October term, 1898.

EDWARD SMITH, PETITIONER AND PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } No. 433.

Petition for the writ of certiorari to the court of appeals of the District of Columbia.

To the honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward Smith, respectfully represents:

That he is a citizen of the United States and the District of Columbia. In the October term for 1897 of the supreme court of said District the grand jurors of the United States of America in and for the District of Columbia, upon their oaths did present an indictment charging him with the crime of murder of one Edmonia Jackson on the fifteenth day of November, in the year of our Lord eighteen hundred and ninety-seven. Upon arraignment your petitioner plead "Not guilty," and, after trial and conviction and a motion for a new trial being overruled, was, on March 4th, 1898, by the supreme court of the District of Columbia, holding a criminal term, sentenced to be hanged. At the trial an exception was noted by the defense to a certain portion of the court's charge, relative to a recent act of Congress entitled "An act to reduce the cases in which the
2 penalty of death may be inflicted," being chapter 29 of the acts of the second session of the Fifty-fourth Congress, approved January 15, 1897, and which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

"SEC. II. That except offenses mentioned in sections fifty-three hundred and thirty-two, thirteen hundred and forty-two, sixteen hundred and twenty-four, fifty-three hundred and thirty-nine, and fifty-three hundred and forty-five, Revised Statutes, when a person is convicted of any offense to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life; and when any person is convicted of an offense to which the punishment of death, or a lesser punishment, in the discretion of the court, is affixed, the maximum punishment shall be imprisonment at hard labor for life.

"SEC. III. That the punishment of death prescribed for any offense specified by the statutes of the United States, except in sections fifty-three hundred and thirty-two, thirteen hundred and forty-two, sixteen hundred and twenty-four, fifty-three hundred and thirty-nine, and fifty-three hundred and forty-five, Revised Statutes, is hereby abolished, and all laws and parts of laws inconsistent with this act are hereby repealed.

"SEC. IV. That nothing herein contained shall apply to or in any way affect any proceeding or indictment now found or pending or that may be found for any offense committed before the passage of this act, and all offenses committed before the passage of this act shall be punished by the laws then in force: Provided, That juries may return qualified verdicts in such cases according to the provisions of section one of this act, and sentences shall be imposed as therein provided.

"SEC. V. That any Indian who shall commit the offense of rape within the limits of any Indian reservation shall be punished by imprisonment at the discretion of the court. So much of the ninth section of chapter three hundred and forty-one of the acts of the year eighteen hundred and eighty-five as is inconsistent herewith is herewith (sic) repealed." 29 Statutes at Large, 487.

The trial court in instructing the jury of their right under this act said, in part, as follows:

"Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their con-
3 sciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law affixes. You are not responsible for that penalty; neither am I. The existence of that law is well known to the community. The man who violates the law by committing murder should anticipate the infliction of the death penalty. In so perpetrating murder he must do it with his eyes open to the consequences. The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdict, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged."

To this part of this instruction, as before said, exception was duly taken at the time by the defense, and upon appeal to the court of appeals of the District of Columbia on this exception, as appears in the bill of exceptions (see record, page 8, of the court of appeals), it was argued that the trial court erred, because section one of the above-mentioned act of January 15, 1897, gave the jury the sole power to qualify their verdict or not, as they might think proper, in ALL cases. That the only duty the trial court had to perform was to inform the jury of the existence of said act and its provisions, leaving it entirely to the discretion of the jury whether they should qualify their verdict or not.

The attention of the court of appeals was called to the case of Spain vs. The State (59 Miss., 19, 24), where the court, passing upon the same question under a similar act of their legislature, said:

"The judgment must be reversed, because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to affix the punishment at imprisonment for life, whereas the

law confers on the jury this right without qualification or restric-
4 tion. The right of the jury to fix the punishment as indicated is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determine by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or any view it might take of it."

The instruction complained of in this case was as follows:

"If the jury simply find the accused guilty as charged in the indictment, it will be the duty of the court to pronounce the death penalty; but, if the evidence in the case warrants them in so doing, they may find him guilty as charged, 'and declare that the punishment to be inflicted shall be imprisonment in the penitentiary for life,' or they may find the defendant not guilty."

There are similar statutes to the act of January 15, 1897, now in question, in the following states: Alabama, California, Georgia, Illinois, and Mississippi.

ALABAMA.

The Alabama statute prescribes as follows:

"Any person who is guilty of murder in the first degree must, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury." (Alabama Criminal Code, section 3729.)

In the case of Brown vs. The State, 109 Alabama, pages 80 to 84, inclusive, the court was called upon to decide the same question as the one at issue, the trial court having instructed the jury in part as follows:

"While the jury are invested by the law with this discretion, the court charges you that it is a legal discretion, one which is a duty devolved upon the jury by the law, to be exercised as a grave and solemn duty; and the jury in so determining the punishment may consider the character of the offense and the circumstances of its commission, if it was committed by the defendant, and all the facts connected with or attendant upon the occurrence as shown by the evidence; and should then determine from a sense of duty which of the punishments, so left to their discretion by the law, is proper in the case and is best calculated to deter others."

5 The supreme court of Alabama, in reviewing this instruction, said:

"The true interpretation of this instruction, that which it was intended the jury should adopt and by their verdict effectuate, is that death should be affixed as the punishment, unless they found in the facts and circumstances of the case some special or peculiar reason for fixing the milder punishment. * * * The instruction is not only erroneous in its construction of the statute to which it refers, but is an invasion of the province of the jury. * * * There is no more marked characteristic of the reformation of our criminal law, wrought and intended to be wrought by our penal code and its successors, than the abolition of capital punishment.

"It is never visited except by a jury on their own responsibility, controlled only by their own consciences, and it is not contemplated that the suggestion of their consciences shall be directed by the judge presiding. * * * The discretion is legal in the sense that it is derived from and conferred by law. But it is not of the nature of a judicial discretion, which is said to be controlled by fixed legal principles.

"If such had been the discretion the lawmakers contemplated it is but a just presumption that judges, not juries, would have been clothed with it. The lawmakers were not unmindful of the constitution of juries, nor of the varied considerations, thoughts, and sentiments which will govern them, the indulgence of which there is no purpose to forbid. It must have been foreseen and anticipated that there would be jurors reluctant to inflict capital punishment. * * * The presiding judge performs his whole duty when he informs the jury that the law commits to them the selection of the punishment which must follow conviction. The idea which seems to be shadowed out, if it is not distinctly expressed in the instruction, is that it is the duty of the jury to impose the graver punishment unless they find some reason in the peculiar facts of the particular case for the imposition of the milder punishment."

In this last case, however, it seemingly appears, although these words are those of the justice delivering the opinion of the court, and the only opinion delivered, that in this particular point the majority of the court did not agree, for which reason the case was cited by the Government at the hearing in the court of appeals. Upon this case your petitioner has more to say, if your honors will grant him the writ here prayed for, only citing the case now as it very clearly argues his side of the question.

The California statute prescribes:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the jury trying the same; or, upon a plea of guilty, the court shall determine the same." (Sec. 190, Penal Code, as amended March 28, 1874.)

Under this enactment there have been many decisions by the supreme court of California, and of the most important shortly, as follows:

The first is that of the People vs. Welch (49 California, 179), where the court says:

"Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed."

Nevertheless, your honor's attention is respectfully called to the fact that it is not here laid down by what rule the jury is to be governed in their judgment, leaving it entirely with them to decide, in the exercise of their unlimited discretion. For the court further says:

"It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result was capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the statute definitions, the legislature intended

to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty and of substituting another punishment in its stead. * * * We may say * * * that it was the purpose of the legislature, by amendment of section 190, to permit the jury, in a case where the facts proved brought the crime of the defendant within the statutory definition of the higher offense, but they believed the punishment of death too severe, to declare that he should be imprisoned for life."

It is respectfully submitted, where the jury is allowed to qualify its verdict "in a case where the facts proved brought the crime of the defendant within * * * the higher offense" (first-degree mur-
7 der), their judgment certainly could not be in any way governed by mitigating or palliating circumstances; but, on the other hand, permission to so qualify their verdict, without any rule laid down with regard thereto, was a permission to do so in all cases at their discretion.

The next cases are the People vs. Jones, 63 California, 169; People vs. Murdock, 64 California, 371; People vs. Brick, 68 California, 190, and People vs. Olsen, 80 California, 128. All of these last-mentioned cases are short and ill considered, basing their judgments, as they state, on the case of People vs. Welch, 49 California, 179, first above considered. While they seemingly hold contra to our contention, still, if their authority is the case of the People vs. Welch, this is impossible, as we have, in our consideration of that case, endeavored to show. Again, in the People vs. Murdock, 64 California, 371, the court said:

"With this power of discretion a court can not interfere. The jury should be left entirely free to act according to their judgment."

Notwithstanding this last expression the decision of the court seems to be the other way, but as they all are so poorly considered it is not safe to place much reliance upon them.

The question was again brought up and reargued before the supreme court of California in the case of the People vs. Bawden, 90 California, 197, and the court, after some little consideration, said:

"Appellant contends for a reversal on account of the instructions given by the court. * * * By these instructions the jury were told, substantially, that if they found the defendant guilty of murder of the first degree, and also found some extenuating facts or circumstance" (which your petitioner submits is a contradiction in terms), "it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that if the evidence did not show such extenuating circumstance, then they should allow the
8 death penalty to be imposed. If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the legislature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court. * * * But these instructions are literal copies of instructions given and approved by this court in People vs. Brick, 68 California, 190. * * * Therefore we decline to reopen the question, and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain."

As to the case of People vs. Brick, referred to in this case, its authority is the case of the People vs. Welch, 49 California, above considered.

We come now to the last case on the subject decided by the California supreme court, which is that of People vs. Kamaunm, 110 California, 613. In this case the court said:

"There was no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court can not direct or advise them upon the subject further than to inform them of their function."

And to the same effect, it would seem, is the case of the People vs. Leary, 105 California, 495. We therefore submit that if ever such was the law in this State, the better judgment of that court, in the last two cases cited, has reversed the same; but we respectfully maintain that, taking the case of People vs. Welch, 49 California, 179, as the authority for all subsequent thereto, but prior to the last two cited, it can not be in truth said to have been so decided, even in California.

GEORGIA.

The Georgia statute prescribes—

"The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend. If the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life."

9

As in California, so under this enactment there are quite a number of decisions by the supreme court of Georgia. But, before we proceed to these, there is another decision by the supreme court of this State under a similar statute which is referred to in all, or nearly all, of the cases under the enactment above set out. It is the case of Johnson vs. State, 58 Ga., 491, which was a prosecution for the larceny of a cow and is punished under the Georgia statutes by confinement in the penitentiary from two to four years, "unless the jury trying the case shall recommend the prisoner to mercy; in which event he shall be punished * * * not more severe than the chain gang; fine of a thousand dollars and imprisonment six months." The court in this case, 58 Ga., 491, says:

"So that a recommendation to mercy grades this offense as less than felony, keeps the prisoner out of the penitentiary, and is a great right to which the defendant is entitled by law. What is that right? It is a right for the jury to say whether he shall be sent to the penitentiary or not. Under what circumstances? Under all circumstances. The law does not limit it to a case of mitigating circumstances or any peculiar circumstances whatever. * * * It is lodged, too, by the general assembly, whether wisely or not we are not called upon to say, in the jury, and not in the judge.

"Ordinarily, punishment, its degree and extent, is vested in the court, * * * but the statute in these offences, vests it in the jury, to the extent of saying that this man shall not go to the penitentiary. Whether they ought not to be merciful, is for them to say, independently of directions from the court as to the circumstances which would justify them in so saying."

The first case under the Georgia statute in regard to murder is that of Hill vs. State, 72 Ga., 132, where the supreme court said:

"The court below instructed the jury, 'If you find this defendant guilty, then you have a right, under our law, either to find him guilty without recommendations, or you have the right, if you find him guilty, to recommend that he be punished by imprisonment in the penitentiary for life. If you find him guilty, it is for you to consider the case and say whether it is a proper case for that or not. You are not to be governed in that instance by your sympathies, but by your judgment, to say whether or not it is such a case as it ought to be done. You must be governed by your judgment, approved by the evidence * * * in the case and the law applicable to it, and then say what is your duty as twelve upright sworn jurors.' * * * This statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; it is not limited or circumscribed in any respect whatever. This law does not prescribe any rule by which the jury may or ought to exercise this great discretion; it does not say that the jury are not to be governed by their sympathies, and that they are to be governed by their judgment, as instructed by the court below. The court below imposed, by its charge, restrictions upon the jury unauthorized and unwarranted by the statute."

In the next case, Inman vs. State, 72 Ga., 280, the instructions of the lower court were similar to those in the case last cited, but the Supreme Court on review saw a distinction, holding as follows:

"We do not think that the language used by the court was calculated to deprive, circumscribe, or restrict the jury in the exercise of their rights to recommend that the accused be imprisoned for life in the penitentiary; in this respect it differs from Hill vs. State decided at the last term of the court.

Yet, we think in cases like this the better practice would be for the court to call the attention of the jury to the law, and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life. This was substantially done by the court in this case."

So, too, in the next case, Valentine vs. State, 77 Ga., 481, the court says:

"The distinction taken between the case of Hill vs. State and Inman vs. State also exists here," and further on, referring to the case of Johnson vs. State, 58 Ga., 491, says:

"Moreover, the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'Why, then, you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

And in the last case in Georgia, i. e., Thomas vs. State, 89 Ga., 480, it is held that "Such recommendation is in all cases matter of discretion with the jury."

ILLINOIS.

The statute in this State prescribes:

"Whoever is guilty of murder shall suffer punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict.

In the two Illinois decisions under this act, Nowacryk vs. State, 139 Ill., 336, and Fletcher et al. vs. State, 117 Ill., 184, the question was whether testimony of mitigating facts could be given in evidence by the accused in order that the jury might qualify their verdict, and the supreme court of that State very properly held that although the character of the testimony was such as to render it inadmissible at the trial under common-law rules, still under the act it was proper for the purpose of allowing the jury to qualify their verdict if they deemed proper.

It is submitted that it is too plain for argument such a ruling goes no further than for the benefit of the accused and can not be construed e converso to preclude the jury from qualifying their verdict in a case where there may not be such evidence. For in the case of Fletcher vs. State, 117 Ill., 184, above cited, the court says:

"In the contemplation of this statute there may be every technical element of murder existing and yet the circumstances be such that the jury would be justified in imposing punishment by confinement in the penitentiary for fourteen years only."

12 MISSISSIPPI.

The Mississippi decisions have been considered, so we will not consider them here.

UTAH.

In Utah a somewhat similar statute prevails, i. e.:

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court."

Having examined all the decisions of the various States under similar statutes, we have reserved for the last the decision of this honorable court cited and relied upon by the Government in its brief before the court of appeals, viz: Calton vs. Utah, 130 U. S., 86.

That decision was simply this: The trial court went to the other extreme, and did not so much as inform the jury that such a statute existed, or of their rights under it, and of course your honors held it error. We wish to direct your attention to what this court said in that case as holding, we submit what your petitioner contends:

"The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of justice."

Your petitioner submits nothing is said here about mitigating circumstances, but on the other hand the jury are restricted, if at all, only to that which "will suffice to meet the ends of justice," leaving it to them

to say what will in each case accomplish this. Proceeding, this court says:

13 "The jury to whom the statute commits the determination of that question, at least in part, were not informed of their duty and responsibility." Here it is desired to direct your honors' attention to the provision in the Utah statute which places the punishment, even after a recommendation by the jury, "at the discretion of the court." Can it not be inferred from this language of your honors, had the Utah statute been as the one in question, with no discretion in the court upon a recommendation by the jury, this court would have construed that statute to have committed the determination of the punishment to the jury not "at least in part," but in the whole, and that the statute under consideration should be so construed?

Upon the following cases the court of appeals bases its opinion and judgment: People vs. Welch, 49 Cal., 179; People vs. Brick, 68 Cal., 190; People vs. Bawden, 90 Cal., 195; Brown vs. State, 109 Ala., 70; Inman vs. State, 72 Ga., 269; Valentine vs. State, 77 Ga., 483; Nowacryk vs. State, 139 Ill., 336, saying: "Those statutes" (statutes of various States) "have been sonstrued and applied, under the direction of the courts, in the same manner that the act here in question has been construed and applied by the court below, in the charge given the jury. In all these cases, upon statutes substantially similar to the act of Congress here involved, the courts have held that the degree of punishment should be determined with reference to the special facts and circumstances of the case."

Your honors' attention is respectfully invited to the fact that there is not one of these cases but which has been examined in this petition, and upon this examination we submit we have shown that the majority of the court of appeals of the District of Columbia is mistaken in their understanding of the decisions in the various States.

14 In closing, your petitioner respectfully submits that the question here presented is one of peculiar gravity, general importance, and upon which there is a conflict of opinion.

Of peculiar gravity, for it involves the question of life or death.

Of general importance, for it affects all prosecutions either for murder or rape in all the courts of the United States.

Upon which there is a conflict of opinion, because even in the decision of the court of appeals of the District of Columbia here complained of Mr. Justice Shepard, of that court, in a very able opinion, dissents as follows:

"I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder the jury may qualify their verdict by adding, 'without capital punishment.'

"In my opinion the language of the act is plain and affords no room for construction—for appeal from its letter to its spirit.

"Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departure therein, whether to be regarded as wise or unwise, must be given effect to as declared.

"To my mind it appears plain what whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed

the matter of its infliction to the uncontrolled discretion of the jury in each case.

"If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court, or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

"Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

"In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding.

"With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

"After such an admonition, to such a jury, the further information that they might, nevertheless, commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

"I can not accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first, and murder of the second degree.

"On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and buglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

"In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

"If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

"For the reasons given, I am of the opinion that the judgment in each case should be reversed."

Again, your petitioner, respectfully invites your honors' attention to the further fact, that on the second trial of the case of U. S. vs. Bram,

in the circuit court of the United States for the district of Massachusetts, the justice presiding merely informed the jury of their right to
16 qualify their verdict, giving no instruction as to what should influence their judgment in so doing, as appears from the following:

[Boyd B. Jones, U. S. Attorney.]

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
DISTRICT OF MASSACHUSETTS,
Boston, Sept. 16, 1898.

F. S. K. SMITH, Esq.,
Attorney at Law,
500 Fifth street N W., Washington, D. C.

DEAR SIR: In the second trial of the Bram case the jury were instructed that they had the power to return a qualified verdict. The instructions were as bare as I have stated. They were not instructed that the exercise of that power depended upon mitigating circumstances. The charge has not been printed.

Yours, very truly,

BOYD B. JONES,
United States Attorney.

(Dictated by B. B. J.)

Again, in the case of the United States vs. Dave Putty, in the United States court for the eastern district of Texas, the court, in its charge to the jury, in speaking of this act of Congress, says:
17 "In the Federal courts there are no degrees in murder unlike our State courts, and consequently a killing upon either express or implied malice is murder, and is punishable by death upon conviction, unless the jury in their discretion recommend 'without capital punishment,' which they have a right to do in each case where the party is charged with murder."

And in concluding its charge the court sums up thus:

"If you find the defendant guilty of murder the form of your verdict will be, 'We, the jury, find the defendant, Dave Putty, guilty of murder in the Indian Territory, as charged in this indictment.' If you see proper, in your discretion, you have a right to add, 'without capital punishment.' If you find him guilty of manslaughter the form of your verdict will be, 'We, the jury, find the defendant, Dave Putty, guilty of manslaughter.' If you find him not guilty the form of your verdict will be, 'We, the jury, find the defendant, Dave Putty, not guilty of murder as charged in this indictment;' date it and sign it by your foreman and return a verdict in court in accordance with your finding."

Wherefore the premises, your petitioner, submits that the question is one of such grave importance as to justify your honors' interference and review, to say nothing of the substantial right given by Congress of which your petitioner maintains he has been deprived. For which reason he further submits the judgment complained of ought to be reversed and a new trial ordered, to effect which he prays this honorable court that a writ of certiorari may issue to the court of appeals of the District of Columbia to remove the whole record and cause into this court for its

review and determination and for such other and further relief as to this court may seem just.

EDWARD SMITH,
By his attorneys,
F. S. KEY SMITH,
CHAPIN BROWN.

F. S. KEY SMITH,
CHAPIN BROWN,
Attorneys for Petitioner.

18 DISTRICT OF COLUMBIA, *ss:*

F. S. Key Smith, being duly sworn, deposes and says that he is one of the attorneys of the petitioner and is authorized to make this verification; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief, and that the source of his knowledge and the grounds of his belief are found in the proceedings and in the record of this cause in the court of appeals of the District of Columbia.

F. S. KEY SMITH.

Sworn and subscribed to before me this 10th day of October, A. D. 1898.

[SEAL.] CHARLES W. STETSON,
Notary Public, D. C.

We hereby certify that we have examined the foregoing petition and in our opinion it is well founded, and that the prayer of the petitioner should be granted.

F. S. KEY SMITH,
CHAPIN BROWN,
Attorneys for Petitioner.

19 In the Supreme Court of the United States.

EDWARD SMITH, PETITIONER AND PLAINTIFF IN ERROR,)
vs.
THE UNITED STATES, DEFENDANT IN ERROR.)

To the honorable the Attorney-General of the United States.

SIR: Please take notice that on the 11th day of October, A. D. 1898, at the opening of the court, or as soon thereafter as counsel can be heard, the petition of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said court thereon.

F. S. KEY SMITH,
CHAPIN BROWN,
Attorneys for Petitioner.

The foregoing notice is hereby accepted, and service of a copy of said petition for writ of certiorari is hereby acknowledged this 10th day of October, 1898.

HENRY E. DAVIS,
U. S. Attorney, D. C.,
for the Attorney-General of the United States.